Chief Justice Moon's Criminal Past

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I. INTRODUCTION

Cheeky title aside, this article does *not* allege that Ronald Moon, Chief Justice of the Hawai'i Supreme Court from 1993 to 2010, has a secret criminal past. Instead, as the curtain closes on Chief Justice Moon's tenure at the helm of Hawai'i's judiciary, this article examines portions of the Moon Court's jurisprudence by selecting and reviewing several decisions in the context of criminal law. We also aim to contribute to the *University of Hawai'i Law Review*'s historical dialogue regarding the Hawai'i Supreme Court's trends and legacies. This special journal issue follows in the footsteps of earlier articles such as 1992's *The Protection of Individual Rights Under Hawai'i's Constitution*, which examined various issues decided by the Hawai'i Supreme Court under Chief Justice Herman Lum.[1]

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* William S. Richardson School of Law, J.D. 2008. As former Co-Editors-in-Chief of the University of Hawai'i Law Review, we are delighted to take part in this special journal issue.

[1] Jon M. Van Dyke et al., *The Protection of Individual Rights Under Hawai'i's Constitution*, 14 U. HAW. L. REV. 311 (1992); *see also, e.g.*, Marcus L. Kawatachi, Comment,

With those goals, this article examines the Moon Court through the lens of two specific issues.[2] First, we review select decisions on evidentiary issues in criminal law cases. This discussion is framed by the fact that Moon sat as chief justice for more than half the present lifetime of the Hawai'i Rules of Evidence, which were codified in 1980. Recent decisions on the effect of that codification (e.g., *State v. Fetelee*[3]), and on elementary foundational requirements (e.g., *State v. Manewa*[4]), illustrate a strict approach to evidentiary issues in the criminal law context.

Second, we highlight select criminal law decisions that implicate privacy concerns. Focusing on search and seizure rulings in various contexts, we review a general trend of increasingly broad privacy protections under Hawai'i law and the correspondingly stringent "reasonable suspicion" requirements imposed on state law enforcement officers.

For each issue, we present a brief introduction to the state of affairs prior to Moon's appointment as chief justice. We then describe various related cases and their holdings. Finally, we conclude the discussion on each issue by identifying trends and other insights illuminated by the Moon Court decisions.

The cases described in this article paint a picture of the Moon Court as unrepentantly requiring prosecutors to adhere to limitations and rules in the criminal context. It is no surprise that along Hawai'i's long and tangled grapevine of law clerks and other young lawyers, Chief Justice Moon developed a reputation as a friendly stickler for the rules.

II. SELECT DECISIONS ON EVIDENCE LAW IN THE CRIMINAL CONTEXT

A. Background—Chief Justice Moon and the Hawai'i Rules of Evidence

Although the bulk of his private career was spent practicing in the civil context, Chief Justice Moon's first job was as a Deputy Prosecutor for the City and County of Honolulu, from 1966 to 1968.[5] Moon was appointed to sit on Hawai'i's First Circuit Court in 1980.[6]

Criminal Procedure Rights Under the Hawaii Constitution Since 1992, 18 U. HAW. L. REV. 683 (1996) (examining early decisions by the Moon Court).

[2] For a broader "sampling of the landmark cases of the Moon Court," see Susan Pang Gochros, *Aloha, Chief Justice Moon*, HAW. B.J., Sept. 2010, at 4.

[3] 117 Haw. 53, 175 P.3d 709 (2008).

[4] 115 Haw. 343, 167 P.3d 336 (2007).

[5] This was Chief Justice Moon's first legal job after clerking for United States District Court Judge Martin Pence. *See* Hon. Ronald T.Y. Moon, Profile, *available at* https://web2.westlaw.com/welcome (follow "Profiler-Professional" link to "Ronald T.Y. Moon") (copy on file with authors); *see also* Gochros, *supra* note 2, at 4.

[6] *See* Hon. Ronald T.Y. Moon, Profile, *supra* note 5.

That same year, during the term of Chief Justice William Richardson, the Hawai'i Legislature adopted the Hawai'i Rules of Evidence (the H.R.E.) as Hawai'i Revised Statutes (H.R.S.) chapter 626.[7] According to Addison Bowman, Emeritus Professor at the University of Hawai'i William S. Richardson School of Law (and author of the often-cited *Hawaii Rules of Evidence Manual*), the Hawai'i Supreme Court "could have unilaterally adopted the rules pursuant to its constitutional prerogative to fashion and enforce rules of practice and procedure."[8] Instead, "the supreme court chose to share this initiative with its sibling branch, recognizing that the legislature has some legitimate interest in evidence law, and harking back to the 1975 enactment of the Federal Rules of Evidence."[9]

In 1993, the same year that Moon was appointed chief justice, the Hawai'i Supreme Court continued this "shared initiative" tack. The court formed the Standing Committee on the Rules of Evidence and charged it with the mandate "to study and evaluate proposed evidence law measures referred by the Hawaii Legislature, and to consider and propose appropriate amendments to the Hawaii Rules of Evidence."[10] In Professor Bowman's view, the past "quarter century of committee oversight, legislative refinement, and appellate court application is a well integrated set of evidence rules that embody some of the best thinking in American evidence law."[11]

The Moon Court's seventeen-year history, spanning more than half the present lifetime of the H.R.E., thus played a fundamental role in setting Hawai'i's law on evidence on its course.

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[7] *See, e.g.*, *Fetelee*, 117 Haw. at 63 n.9, 175 P.3d at 719 n.9 ("The Hawai'i Rules of Evidence were codified in 1981. *See* 1980 Haw. Sess. L. Act 164, § 19 at 274 ('This Action shall take effect on January 1, 1981.').").

[8] ADDISON M. BOWMAN, HAWAII RULES OF EVIDENCE MANUAL vii (2010-2011 ed.). Note that even the Moon Court relied upon Professor Bowman's evidence manual. *See, e.g.*, State v. Fitzwater, 122 Haw. 354, 365, 227 P.3d 520, 531 (2010) (quoting the "*HRE Manual* § 803-3[5][B]").

[9] BOWMAN, *supra* note 8, at vii; *see also* Addison M. Bowman, *The Hawaii Rules of Evidence*, 2 U. HAW. L. REV. 431 (1981) (describing the early history of the H.R.E. adoption).

[10] BOWMAN, *supra* note 8, at viii.

[11] *Id.*

B. Case Summaries

1. Fetelee—*As a "singular and primary source" for the rules of evidence, the codified rules replace the long-accepted common law res gestae exception*

Hawai'i's mere adoption of formal rules of evidence did not answer the question of *how* such rules should be applied. This question is complicated when one recognizes that prior decisions on evidentiary issues, under the common law, might—or might not—be applicable under the codified H.R.E.

In a 2008 opinion written by Chief Justice Moon, *State v. Fetelee*,[12] the Hawai'i Supreme Court tackled one aspect of this thorny question, in the context of criminal law.

Following a jury trial, defendant Faa Fetelee was convicted of attempted murder, attempted assault, and theft.[13] The theft charge stemmed from Fetelee's confrontation with a woman in the parking lot of his apartment building.[14] He was accused of stealing ten dollars from the woman, but he testified that he merely asked the woman for a cigarette and did not take the money.[15]

The attempted murder and attempted assault charges stemmed from a confrontation with two men walking on the street fronting Fetelee's apartment building.[16] Fetelee was accused of stabbing one of the men and kicking the other in the face.[17] Fetelee testified that he was merely defending himself.[18]

Both of these incidents were preceded by an incident involving Fetelee inside an apartment in the complex (the "apartment incident").[19] Fetelee and prosecution witnesses testified that he entered the apartment in an agitated and intoxicated state and caused a fan to hit the ceiling.[20] Prosecution witnesses testified that Fetelee then attacked and chased two men in the apartment.[21] The

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[12] 117 Haw. 53, 175 P.3d 709.

[13] *See id.* at 55, 175 P.3d at 711.

[14] *See id.*

[15] *See id.* at 56-58, 175 P.3d at 712-14.

[16] *See id.* at 55, 175 P.3d at 711.

[17] *See id.* at 57, 175 P.3d at 713.

[18] *See id.* at 58-59, 175 P.3d at 714-15.

[19] *See id.* at 55, 175 P.3d at 711.

[20] *See id.* at 56, 58, 175 P.3d at 712, 714.

[21] *See id.* at 56, 175 P.3d at 712. Fetelee "testified that he was upset, but not mad," that the fan had accidentally hit the ceiling, and that he had neither attacked nor chased the men. *See id.* at 58, 175 P.3d at 714. Both Fetelee and the witnesses testified that he returned a short time later to apologize and appeared calm. *See id.* at 56, 58, 175 P.3d at 712, 714.

apartment incident did not lead directly to the charges that were the subject of the trial.[22]

Fetelee filed a motion in limine to block evidence of his uncharged "bad acts," such as the apartment incident.[23] Under H.R.E. Rule 404(b), the admissibility of "other crimes, wrongs, or acts" is limited; evidence of the bad act is not admissible to prove character, but can be admissible if probative "of another fact that is of consequence."[24]

The trial court denied Fetelee's motion and allowed evidence of the apartment incident to be admitted as res gestae,[25] or "circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act."[26] The trial court explained:

> It's the judgment of the court that there is sufficient evidence for a reasonable juror to conclude that within a time period of as short as three minutes before Mr. Fetelee's contact with Ms. Lincoln, he was angry and intoxicated . . . while engaging in assaultive behavior at [the apartment]. Accordingly, [the apartment incident] was sufficiently coincident with the alleged offenses as to constitute the *res gestae* of the alleged offenses. Though the incident does not constitute a prior bad act, it is noted that its relevance does include an explanation of [Mr. Fetelee's] motive, that is, to manifest the anger he continued to experience as a result of the incident in [the apartment].[27]

Fetelee appealed the trial court's decision on the basis that the common law res gestae doctrine did not constitute an exception to Hawai'i's now-codified rule of evidence.[28]

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[22] *See id.* at 55, 175 P.3d at 711.

[23] *See id.* at 59-60, 175 P.3d at 715-16.

[24] H.R.E. Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.

[25] Literally, "things done." *See, e.g.*, BLACK'S LAW DICTIONARY 1173 (5th ed. 1979).

[26] *Fetelee*, 117 Haw. at 65, 175 P.3d at 721 (quoting Territory v. Lewis, 39 Haw. 635, 639 (1953)).

[27] State v. Fetelee, 114 Haw. 151, 154, 157 P.3d 590, 593 (App. 2007) (quoting the trial court), *rev'd*, 117 Haw. 53, 175 P.3d 709.

[28] On appeal:

> Fetelee argue[d] that the incident in [the apartment] constituted a prior bad act that [was] inadmissible under HRE 404(b) or, alternatively, under Rule 403. Specifically, Fetelee argue[d] that since the codification of HRE in 1981, there has been no indication that

Fetelee's codification argument was rejected by the Intermediate Court of Appeals (ICA).[29] The ICA reasoned that evidence of the apartment incident was "necessary to complete the story for the jury" because it was "linked to the crimes charged," and "relevant to provide the jury with an explanation as to why Fetelee was so angry and agitated."[30] Citing decisions from a number of appellate courts in other jurisdictions, the court concluded: "There is a *res gestae* exception to HRE Rule 404(b)."[31]

In a detailed opinion spanning thirty-four reported pages, the Hawai'i Supreme Court concluded otherwise: "the *res gestae* doctrine is no longer a legitimate independent ground for admissibility of evidence in Hawai'i inasmuch as . . . it is superseded by the adoption of the HRE."[32] Thus, the trial court and ICA judgments were vacated.[33]

Writing for Justices Levinson, Acoba, and Duffy,[34] Chief Justice Moon acknowledged that many jurisdictions and commentators continue to support a res gestae exception, but emphasized that the H.R.E. is "*a singular and primary source*" of evidentiary rules.[35] With this emphasis, *Fetelee* serves as a plain example of the Moon Court strictly applying evidentiary rules in the criminal context.

2. Manewa—*Strict foundational requirements for evidence concerning analyses of illegal drugs*

Fetelee is not the only example of the Moon Court strictly adhering to the requirements of evidentiary rules. In a series of cases near the end of Chief Justice Moon's tenure, the Moon Court similarly applied strict foundational requirements to evidence of test results introduced by the prosecution. This series spanned a broad contextual spectrum, ranging from drug cases involving the potential for decades-long prison sentences, to speeding cases involving no more than a small fine and license suspension.

Hawai'i courts intended to expand the *res gestae* doctrine to include an exception to wrongs, crimes, or acts encompassed under HRE 404.

Id. at 157, 157 P.3d at 596.

[29] *See id.* at 159, 157 P.3d at 598.

[30] *Id.*

[31] *Id.* at 157-59, 157 P.3d at 596-98.

[32] State v. Fetelee, 117 Haw. 53, 81, 175 P.3d 709, 737 (2008).

[33] *See id.* at 86, 175 P.3d at 742.

[34] Justice Nakayama concurred in Chief Justice Moon's opinion, but wrote "separately to emphasize the ongoing importance of the *res gestae* doctrine": "Although I join the majority in its holding that the HRE supersedes the *res gestae* doctrine, I do not believe the common law is antiquated." *Id.* at 90, 175 P.3d at 746 (Nakayama, J., concurring).

[35] *Id.* at 79, 175 P.3d at 735 (majority opinion) (quoting SEN. STAND. COMM. REP. NO. 22-80, *reprinted in* 1980 HAW. SEN. J. 1030, 1031) (emphasis added by Moon, C.J.).

In the 2007 *State v. Manewa* decision,[36] the court examined foundational requirements for evidence on the weight and nature of drugs seized from the defendant, Isaac Manewa.[37] Manewa appealed his conviction on the basis that the trial court abused its discretion by "allow[ing the State's] chemist to opine on the weight and identity of the State's drug evidence."[38]

Manewa argued that although the chemist was qualified as an expert in drug analysis and identification, and had personally analyzed the seized substance, the chemist had no "personal knowledge that the instruments he used were properly calibrated and/or serviced."[39] Without evidence to prove, beyond a reasonable doubt, the amount and type of substance seized, Manewa argued that his conviction could not stand.

The ICA rejected Manewa's appeal. Quoting the Hawai'i Supreme Court's 1996 decision in *State v. Wallace*,[40] the ICA reasoned that the prosecution was merely required to satisfy a "foundational prerequisite for the reliability of a test result [by] showing that the measuring instrument is in proper working order."[41] Although the prosecution had not produced maintenance records for the analytical balance used to weigh the substance, the ICA stated that the prosecution "did offer an independent source of reliable evidence that the balance was working properly," in the form of testimony from the chemist.[42] The chemist testified that he "personally verified and validated the balance monthly, in addition to the semi-annual service by the manufacturer's representative."[43]

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[36] 115 Haw. 343, 167 P.3d 336 (2007). Not surprisingly, *Manewa* was not the first Moon Court decision involving evidentiary foundation. For example, *Manewa* includes a discussion of *State v. Wallace*, 80 Haw. 382, 910 P.2d 695 (1996), decided relatively early in Chief Justice Moon's time on the court.

[37] Manewa was convicted by the trial court of promoting a dangerous drug in the first and second degree, under H.R.S. section 712-1241(1)(b)(ii)(A) and 1242(1)(b)(i), respectively. *See Manewa*, 115 Haw. at 345, 167 P.3d at 338.

[38] *Id.* at 349-50, 167 P.3d at 342-43.

[39] State v. Manewa (*Manewa ICA*), No. 27554, 2006 WL 3735966, at *3 (Haw. App. Dec. 20, 2006) (unpublished table decision), *rev'd*, 115 Haw. 343, 167 P.3d 336.

[40] 80 Haw. 382, 910 P.2d 695 (1996). Among other issues, *Wallace* addressed the foundational requirements for evidence on the weight of cocaine seized from the defendant. *See id.* at 411-12, 910 P.2d at 724-25. In a relatively brief analysis, the court noted that the forensic analyst who weighed the cocaine with an analytical balance, and who testified at trial, did not have personal knowledge that the balance had been properly calibrated. Thus, "[t]here being no reliable evidence showing that the balance was in proper working order . . . the prosecution failed to lay a sound factual foundation." *Id.* at 412, 910 P.2d at 725 (internal citations and quotations omitted).

[41] *Manewa ICA*, 2006 WL 3735966, at *2 (quoting *Wallace*, 80 Haw. at 406, 910 P.2d at 719); *see also Manewa*, 115 Haw. at 350, 167 P.3d at 343.

[42] *Manewa ICA*, 2006 WL 3735966, at *3.

[43] *Id.* In his appeal, Manewa summarized the ICA's decision:

Manewa then appealed the issue to the Hawai'i Supreme Court. The Moon Court[44] agreed with the ICA that *Wallace* applied, but vacated Manewa's convictions[45] on the basis that the prosecution had not satisfied the foundational requirement of showing that the balance was in proper working order:

> [The chemist] was not qualified as an expert in the calibration of the analytical balance. [The chemist] used the balance to weigh the evidence although he did not know how its mechanism functioned. The balance is an electronic instrument. [The chemist] himself did not know how to calibrate the balance or how to service it. He indicated that he had never calibrated the balance and that he would not be able to service the machines . . . .[46]

The court ruled the chemist "'lacked the personal knowledge that the balance had been correctly calibrated and merely assumed that the manufacturer's service representative had done so.'"[47] The court also suggested at least one seemingly simple solution to this foundational hurdle: the admission of "business records of the manufacturer indicating a correct calibration."[48] The prosecution, however, "did not offer such records into evidence."[49] Accordingly, all charges requiring proof of the *amount* of drugs seized were vacated.[50]

> Applying *Wallace,* the ICA noted that [the prosecution] did not produce any maintenance records, but reasoned that this was not necessary as [the prosecution] had offered an independent source of reliable evidence. SDO at 6-7. *This source was [the chemist], an expert, testifying that he personally verified and validated the balance each month in addition to its semi-annual servicing.* SDO at 7. This testimony, the ICA held, satisfied the proper working order test. *Id.* . . . The ICA held that this testimony was not hearsay as it was based on [the chemist's] own personal knowledge that the equipment had been verified and, thus, was working properly.

Manewa, 115 Haw. at 351, 167 P.3d at 344 (quoting Manewa's application for writ of certiorari) (emphasis in *Manewa*).

[44] Chief Justice Moon joined a concurring opinion by Justice Levinson, agreeing with the majority opinion that "a proper foundation for the *weight* of the methamphetamine was not established." *Manewa*, 115 Haw. at 359, 167 P.3d at 352 (Levinson, J., concurring) (quoting majority opinion) (emphasis in *Manewa*). The concurring opinion was written to explain a different rationale for the inapplicability of *State v. Schofill*, 63 Haw. 77, 621 P.2d 364 (1980), on an issue separate from this foundation question.

[45] *See Manewa*, 115 Haw. at 358, 167 P.3d at 351. Note, however, that Manewa was convicted of lesser included charges, where the charged counts only required evidence of the type of drug, not the amount. *See id.*

[46] *Id.* at 354-55, 167 P.3d at 347-48.

[47] *Id.* at 355, 167 P.3d at 348 (quoting State v. Wallace, 80 Haw. 382, 412, 910 P.2d 695, 725 (1996)).

[48] *Id.* at 355-56, 167 P.3d at 348-49.

[49] *Id.*

[50] *Id.* at 358, 167 P.3d at 351.

In contrast, the prosecution had satisfied the foundational requirements for reliability of the "GCMS"[51] and "FTIR"[52] instruments used to identify the *nature* of the seized substance (methamphetamine).[53] This was because the chemist testified that he conducted a "routine check" "each and every morning" on the GCMS, and had been "trained to ensure that the GCMS and FTIR instruments were in working order."[54] Thus, Manewa was convicted of lesser included crimes that only required proof of knowing possession of "any dangerous drug in *any* amount."[55]

3. Assaye, Werle, *and* Fitzwater—*Evidentiary requirements in the driving cases*

The court has also addressed essentially the same foundational question in a less drastic criminal context—speeding tickets. In the 2009 *State v. Assaye* case,[56] evidence collected by a police officer with a laser gun was used to convict Abiye Assaye of speeding. Assaye appealed his conviction to the ICA, on the basis that the State had "failed to establish the requisite foundation for such evidence."[57] In a summary disposition order, the ICA cited two prior cases regarding "speed gun" evidence, *State v. Tailo*[58] and *State v. Stoa*,[59] to conclude that the "district court did not err in admitting the laser-gun reading."[60]

On appeal from the ICA, the Moon Court took a more detailed look at the issue and distinguished the *Tailo* and *Stoa* decisions. In *Tailo*, the defendant had alleged that no foundation was laid to support the accuracy of a "tuning fork" test used to calibrate a radar gun.[61] The Hawai'i Supreme Court, in 1989, noted: "Because of the strength of the scientific principles on which the radar gun is based, every recent court which has dealt with the question has taken judicial notice of the scientific reliability of radar speedmeters as recorders of

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[51] Gas chromatograph/mass spectrometer. *See id.* at 347, 167 P.3d at 340.

[52] Fourier transform infrared spectrometer. *See id.*

[53] *Id.* at 354, 167 P.3d at 347.

[54] *Id.* at 354-55, 167 P.3d at 347-48 (internal quotation marks omitted).

[55] *Id.* at 359, 167 P.3d at 352 (quoting HAW. REV. STAT. § 712-1243(1)(c) (1993 & Supp. 2003)) (emphasis added).

[56] 121 Haw. 204, 216 P.3d 1227 (2009).

[57] State v. Assaye (*Assaye ICA*), No. 29078, 2009 WL 81871, at *1 (Haw. App. Jan. 13, 2009), *rev'd*, 121 Haw. 204, 216 P.3d 1227.

[58] 70 Haw. 580, 779 P.2d 11 (1989).

[59] 112 Haw. 260, 145 P.3d 803 (App. 2006), *overruled by Assaye*, 121 Haw. at 214, 216 P.3d at 1237.

[60] *Assaye ICA*, 2009 WL 81871, at *1.

[61] *Assaye*, 121 Haw. at 210, 216 P.3d at 1233 (citing *Tailo*, 70 Haw. at 582, 779 P.2d at 12).

speed."[62] Thus, the *Tailo* court concluded that the prosecution "is not required to prove the accuracy of the tuning fork" because "[r]equiring proof of the accuracy of those testing devices in every case would impose an inordinate burden upon" the prosecution.[63]

"In *Stoa*, the ICA extended *Tailo*'s analysis regarding the accuracy of a radar gun to that of a laser gun."[64] And in addition to taking judicial notice of the accuracy of laser guns, the ICA also held that a police officer's testimony that he performed a series of four functionality tests on the laser gun prior to his patrol was sufficient to set forth a "sound factual foundation."[65]

In *Assaye*, the Moon Court recognized that the officer had apparently performed the same four functionality tests as the officer in *Stoa*.[66] However, the court reached a starkly different conclusion on the admissibility of the evidence:

> [W]e hold that the ICA's decision in this case, and by implication the decision in *Stoa*, is obviously inconsistent with the court's decision in *Manewa* insofar as *Manewa* requires the prosecution to prove that the four tests performed by [the officer] were procedures recommended by the manufacturer for the purpose of showing that the particular laser gun was in fact operating properly. . . .[67]

In addition, the court also held that training must satisfy the same standard; the prosecution must prove that the officer's training "'meets the requirements' of the manufacturer of the laser gun."[68]

Assaye's conviction was reversed because the prosecution had not properly submitted evidence regarding the manufacturer's recommendations for calibration and training: "the trial court abused its discretion by concluding that [the officer's] testimony provided a proper foundation for the speed reading given by the laser gun."[69]

Days later, this evidentiary foundation question was addressed in another context in *State v. Werle*,[70] regarding evidence of intoxication from a blood alcohol test used to support the conviction of William Werle for drunk driving.[71] Rather than citing the *Manewa* line of cases, the court's analysis instead began with H.R.E. Rules 702 and 703 (regarding the admissibility of

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[62] *Id.* (quoting *Tailo*, 70 Haw. at 582, 779 P.2d at 13).

[63] *Id.* at 211, 216 P.3d at 1234 (quoting *Tailo*, 70 Haw. at 583-84, 779 P.2d at 14).

[64] *Id.* (citing *Stoa*, 112 Haw. at 265, 145 P.3d at 808).

[65] *Id.* at 211-12, 216 P.3d at 1234-35.

[66] *See id.* at 212, 216 P.3d at 1235.

[67] *Id.*

[68] *Id.* at 216, 216 P.3d at 1239 (citation omitted).

[69] *See id.* at 216, 216 P.3d at 1239.

[70] 121 Haw. 274, 218 P.3d 762 (2009).

[71] *See id.* at 276, 218 P.3d at 764. More precisely, Werle was convicted of operating a vehicle under the influence of an intoxicant under H.R.S. sections 291E-61(a) and (d). *See id.*

scientific or technical evidence).[72] But the fundamental concern with reliable test methods was the same as in *Manewa* and *Assaye*: "As part of the foundation, the prosecution must establish the reliability of the test results which establish intoxication."[73]

In *Werle*, the prosecution submitted testimony from the analyst who tested the defendant's blood sample.[74] The analyst explained his understanding of the scientific principles underlying the testing method, and also testified that Werle's blood alcohol level was outside the maximum range of the instrument, and thus the sample had to be diluted before testing.[75] The prosecution also submitted testimony from the Ph.D. biochemist who directed the Department of Health-licensed toxicology lab and its quality assurance program.[76]

Despite this testimony, the court held that "there was insufficient competent testimony in the record to establish the foundational reliability of Werle's blood alcohol test results," because "[n]either [the biochemist's] nor [the analyst's] testimony established the validity of the scientific principles" underlying the testing instrument and technique.[77] The court suggested that the biochemist "would have been the logical witness to testify as to the validity of the scientific

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[72] *See id.* at 282, 218 P.3d at 770 ("Blood alcohol tests are scientific in nature. In Hawai'i, the admissibility of scientific or technical evidence is governed by Hawai'i Rules of Evidence (HRE) Rules 702 and 703 (1993)."). Rule 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. In determining the issue of assistance to the trier of fact, *the court may consider the trustworthiness and validity of the scientific technique or mode of analysis employed by the proffered expert.*

HAW. R. EVID. 702 (emphasis added). Rule 703 states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. *The court may, however, disallow testimony in the form of an opinion if the underlying facts or data indicate lack of trustworthiness.*

HAW. R. EVID. 703 (emphasis added); *see also Werle*, 121 Haw. at 282, 218 P.3d at 770 (stating the test for reliability of scientific evidence under H.R.E. Rules 702 and 703: "Whether scientific evidence is reliable depends on three factors, the validity of the underlying principle, the validity of the technique applying that principle, and the proper application of the technique on the particular occasion." (quoting State v. Montalbo, 73 Haw. 130, 136, 828 P.2d 1274, 1279 (1992))).

[73] *Werle*, 121 Haw. at 282, 218 P.3d at 770 (citation omitted).

[74] *See id.* at 278, 218 P.3d at 766.

[75] *See id.*

[76] *See id.* at 279, 218 P.3d at 767.

[77] *Id.* at 286, 218 P.3d at 774.

principles," but he "was not asked to explain [those] principles."[78] Thus, Werle's conviction was reversed.[79]

The last in the series of cases identified here, *State v. Fitzwater*,[80] was decided in 2010 and addressed the foundational requirement in another relatively low-tech speeding case. This time, the vehicle's speed was measured by the speedometer in an officer's vehicle. Chief Justice Moon joined an opinion written by his eventual successor, then-Associate Justice Mark Recktenwald, and once again the court departed from the trial court's and ICA's rulings and vacated the conviction.

Citing *Wallace*, *Manewa*, and *Assaye*, the court held that the prosecution was required to establish the reliability of the officer's speedometer, which had been calibrated in a "speed check."[81] For the result of that speed check to be admissible, the State was required to establish (1) "how and when the speed check was performed, including whether it was performed in the manner specified by the manufacturer of the equipment used to perform the check, and (2) the identity and qualifications of the person performing the check, including whether that person had whatever training the manufacturer recommends in order to competently perform it."[82]

Perhaps aiming to comply with *Manewa*'s suggestion that calibration records from a manufacturer can lay the required foundation, the prosecution submitted a "speed check card" into evidence, to demonstrate that the officer's speedometer had been calibrated by an independent shop.[83] The prosecution, however, once again relied too heavily on the officer's testimony for this evidence. The court held that the officer could not properly authenticate the independent shop's speed check card under H.R.E. Rule 803(b)(6).[84] Under Rule 803(b)(6)—the "business records" exception to the hearsay rule—records of a regularly conducted activity can be authenticated by a "custodian or other qualified witness."[85] However, the officer was not the custodian of the speed

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[78] *Id.* at 285-86, 218 P.3d at 773-74.

[79] *See id.* at 287, 218 P.3d at 775.

[80] 122 Haw. 354, 227 P.3d 520 (2010).

[81] *See id.* at 378, 227 P.3d at 544.

[82] *Id.* at 376-77, 227 P.3d at 542-43.

[83] *See id.* at 357, 227 P.3d at 523.

[84] *See id.* at 365-70, 227 P.3d at 531-36.

[85] *See id.* at 365, 227 P.3d at 531. H.R.E. Rule 803(b)(6) allows, as an exception to the hearsay rule, admission of:

> Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made in the course of a regularly conducted activity, at or near the time of the acts, events, conditions, opinions, or diagnoses, as shown by the testimony of the custodian or other qualified witness . . . .

check records, did not have personal knowledge of how the speed checks were done, and did not testify about who performed the checks.[86]

Thus, the officer was not a "qualified witness" because his testimony did not contain the necessary "indicia of reliability" to support authentication by a non-custodian.[87] "As a result, 'inadequate foundation was laid to show' that the speed check 'could be relied on as a substantive fact.'"[88]

C. Trends and Other Comments on the Evidence Cases

Together, these selected evidence cases hint at four general trends in the later years of the Moon Court.

First, the cases reflect an increasingly rule-based approach to evidentiary questions in the criminal context. This approach is clear in *Fetelee*, which strictly abolished the common law res gestae doctrine in favor of the H.R.E. The same trend is also evident, in various ways, in the foundation cases. For example, in *Fitzwater*, the court explained that although the "indicia of reliability" test remains relevant with respect to admissibility of business records, this common law test does not "supplant" the rules:

> Thus, we hold that when an entity incorporates records prepared by another entity into its own records, they are admissible as business records of the incorporating entity provided that it relies on the records, there are other indicia of reliability, and the requirements of Rule 803(b)(6) are otherwise satisfied. The requirements of (1) reliance and (2) indicia of reliability *do not supplant the provisions of the rule; rather, we view them as necessary in these circumstances to satisfy the rule's requirement that the records were "made in the course of a regularly conducted activity"* of the incorporating entity.[89]

Similarly, *Werle*'s foundational analysis began with H.R.E. Rules 702 and 703 as opposed to the common law.[90]

Thus, while codification of the rules cannot replace the need for a judiciary to apply those rules using appropriate tests, the Moon Court grounded its application more firmly in the modern rules than in prior case law. This approach may yet sway other jurisdictions. For example, Justices Albin and Long of the New Jersey Supreme Court favorably described and quoted the Hawai'i Supreme Court's *Fetelee* decision, leading them to conclude that "[r]es

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[86] *See Fitzwater*, 122 Haw. at 365-66, 369, 227 P.3d at 531-32, 535.

[87] *Id.* at 369, 227 P.3d at 535.

[88] *Id.* at 377, 227 P.3d at 543 (quoting State v. Wallace, 80 Haw. 382, 412, 910 P.2d 695, 725 (1996)).

[89] *Id.* at 367-68, 227 P.3d at 533-34 (citing HAW. R. EVID. 803(b)(6)) (emphasis added).

[90] *See* State v. Werle, 121 Haw. 274, 282, 218 P.3d 762, 770 (2009).

gestae is the moldy cardboard box in the basement, whose contents no longer have any utility."[91]

The second trend gleaned from these cases is a strict adherence to evidentiary requirements, even in the face of contrary decisions by other courts. For example, in *Fetelee*, the ICA had followed, and cited at length, decisions from appellate courts in Washington,[92] Michigan,[93] South Dakota,[94] and Colorado.[95] Each held that the common law res gestae exception survived codification of the rules of evidence. The Hawai'i Supreme Court also acknowledged that res gestae "has continued to be utilized by other courts as a viable concept . . . and an exception to Rule 404(b),"[96] citing decisions by federal courts of appeal in the Fifth,[97] Sixth,[98] Eighth,[99] Ninth,[100] Tenth,[101] and Eleventh[102] circuits.[103]

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[91] State v. Kemp, 948 A.2d 636, 652 (N.J. 2008) (Albin, J., concurring).

[92] *See* State v. Fetelee, 114 Haw. 151, 158, 157 P.3d 590, 597 (App. 2007) ("The [Washington] court concluded that such admission was proper under the *res gestae* or 'same transaction' exception to Rule 404(b)." (citing State v. Elmore, 985 P.2d 289, 311 (Wash. 1999))). "This exception permits the admission of evidence of other crimes or misconduct where it is a link in the chain of an unbroken sequence of events surrounding the charged offense in order that a complete picture be depicted for the jury." *Id.* (quoting State v. Acosta, 98 P.3d 503, 512 (Wash. App. 2004)).

[93] *See id.* ("Michigan courts have defined the *res gestae* exception to Rule 404(b) as that 'evidence of prior bad acts [that] is admissible where those acts are so blended or connected with the charged offense that proof of one incidentally involves the other or explains the circumstances of the crime.'" (quoting People v. Robinson, 340 N.W.2d 303, 304 (Mich. App. 1983))).

[94] *See id.* ("[T]he Supreme Court of South Dakota stated that 'evidence of 'other acts' may be admissible as *res gestae* evidence, . . . an exception to [South Dakota Codified Laws (SDCL)] 19-12-5 or Federal Rule 404(b).'" (citing State v. Pasek, 691 N.W.2d 301, 309 n.7 (S.D. 2004))).

[95] *See id.* at 159, 157 P.3d at 598 ("The [Supreme Court of Colorado] further emphasized that *res gestae* evidence is the antithesis of CRE [(Colorado Rules of Evidence)] 904(b) evidence. Where CRE 404(b) evidence is independent from the charged offense, *res gestae* evidence is limited to the offense." (quoting People v. Quintana, 882 P.2d 1366, 1373 n.12 (Colo. 1994))).

[96] State v. Fetelee, 117 Haw. 53, 68, 175 P.3d 709, 724 (2008).

[97] *See id.* (citing United States v. McDaniel, 574 F.2d 1224, 1227 (5th Cir. 1978)); *see also* United States v. Williams, 900 F.2d 823, 825 (5th Cir. 1990).

[98] *See id.* (quoting United States v. Hardy, 228 F.3d 745, 748 (6th Cir. 2000) (explaining that res gestae evidence "does not implicate Rule 404(b)")).

[99] *See id.* (citing United States v. Johnson, 463 F.3d 803, 808 (8th Cir. 2006)).

[100] *See id.* ("A jury is entitled to know the circumstances and background of a criminal charge." (quoting United States v. Daly, 974 F.2d 1215, 1217 (9th Cir. 1992))).

[101] *See id.* (citing United States v. Green, 175 F.3d 822, 831 (10th Cir. 1999)).

[102] *See id.* (citing United States v. Weeks, 716 F.2d 830, 832 (11th Cir. 1983)).

[103] *See id.* at 68-69, 175 P.3d at 724-25 (explaining that the res gestae exception continues to be utilized in a number of other jurisdictions, albeit sometimes with different terminology) (quoting, for example, *Green*, 175 F.3d at 831, which noted that "[d]irect or intrinsic evidence

However, after a long discussion of various opinions which analyzed the viability of the res gestae doctrine, the Hawai'i Supreme Court decided that such opinions merely "underscore[] the need" for the court to reach its own conclusion.[104]

Likewise, in *Assaye*, the court sharply curtailed application of the earlier *Tailo* and *Stoa* decisions, in favor of its more recent *Manewa* precedent. Instead of following *Tailo*, which permitted judicial notice of the reliability of radar speed measurements, or *Stoa*, in which the ICA logically extended the *Tailo* ruling to laser guns, the Moon Court diligently applied its foundational "reliability" requirements from the *Manewa* drug case. The court relied on the principles in *Manewa* despite the seemingly different factual contexts. Thus, it appears that neither prior cases from Hawai'i, nor cases from other jurisdictions, could steer the Moon Court from its own evidentiary course.

The third trend to be teased from these evidence decisions is an apparent insistence on the foundational reliability test, even at the expense of an arguably more "practical" perspective. For example, in *Assaye*, the court turned away from its prior rationale that "[r]equiring proof of the accuracy of [speed] testing devices in every case would impose an inordinate burden upon" the prosecution.[105] To the Moon Court, this practical burden was apparently outweighed by a need to follow the evidentiary rules.

Similarly, in *Fitzwater*, the officer testified that he trailed the defendant and measured him traveling at *twice* the thirty-five mile per hour limit.[106] Under those circumstances, it is difficult to imagine that a precise calibration was necessary to reliably test whether the defendant was speeding.

In *Werle*, the prosecution's laboratory analyst testified that he needed to dilute the defendant's blood sample, because the alcohol content was above the instrument's maximum analytical range.[107] Again, it is questionable whether a precisely calibrated instrument was necessary to reliably establish intoxication under those facts.

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of the crime does not fall within the ambit of the rule."). The *Fetelee* court also noted that courts from the Seventh Circuit, D.C. Circuit, Kansas, Maryland, Wyoming, Montana, Illinois, Maine, and Missouri have concluded, like the Hawai'i Supreme Court, that res gestae is no longer a viable doctrine. *See, e.g., id.* at 67-68, 175 P.3d at 724-25; *see also* State v. Kemp, 948 A.2d 636, 652 (N.J. 2008) (Albin, J., concurring).

[104] *See Fetelee*, 117 Haw. at 78, 175 P.3d at 734 ("The foregoing discussion underscores the need for this court to settle the question whether the *res gestae* doctrine can co-exist with the HRE.").

[105] State v. Assaye, 121 Haw. 204, 211, 216 P.3d 1227, 1234 (2009) (quoting State v. Tailo, 70 Haw. 580, 583, 779 P.2d 11, 14 (1989)).

[106] *See* State v. Fitzwater, 122 Haw. 354, 357, 227 P.3d 520, 523 (2010).

[107] *See* State v. Werle, 121 Haw. 274, 278, 218 P.3d 762, 766 (2009).

In *Manewa*, the relevant statute required evidence that the defendant possessed more than one-eighth of an ounce of a dangerous drug.[108] Although it is unclear from the court's opinion how close the analyst's measurement was to this cut-off, laboratory-grade analytical balances are typically far more precise than plus/minus several grams.[109]

To summarize this third trend, it appears that in the context of evidentiary challenges, the Moon Court forced practical considerations to yield to the procedural certainty and protection afforded by rules of evidence.

The fourth and final trend illustrated by these evidence cases is reflected in their authors. The transition from common law to codified rules began with Chief Justice Richardson and his successor Chief Justice Lum. Chief Justice Moon continued this movement and later penned the *Fetelee* decision. Current Chief Justice Recktenwald authored the *Fitzwater* opinion, which closely followed the *Wallace-Manewa-Assaye* line.[110] Thus, it appears that the court's approach to these evidence issues will survive Chief Justice Moon's retirement, at least for now.

III. SELECT DECISIONS IMPLICATING PRIVACY CONCERNS IN THE CRIMINAL CONTEXT

A. Background

In contrast to the Fourth Amendment to the U.S. Constitution's protection against "unreasonable searches and seizures,"[111] Hawai'i's corresponding

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[108] *See* State v. Manewa, 115 Haw. 343, 167 P.3d 336 (2007) (citing HAW. REV. STAT. § 712-1242 (1993 & Supp. 2003) (requiring possession of more than one-eighth of an ounce)).

[109] One of this article's authors has personal experience with analytical balances and GC/MS instruments in the laboratory. From that experience, it is readily apparent that analytical balances are routinely used to measure substances with much finer precision (such as micrograms—1/1000 of a gram—or less) than at issue in *Manewa*.

Furthermore, we question the court's differing conclusions on the analytical balance used to weigh the seized substance, as opposed to the GC/MS instrument used to identify the nature of the substance. The court took foundational solace in the fact that the GC/MS instrument was calibrated daily, while the balance was calibrated only semi-annually. *See id.* at 346-47, 167 P.3d at 353-54. However, a practical explanation for this discrepancy cuts against the court's conclusion. In the author's experience, analytical balances tend to be robust, maintaining their relative precision even with infrequent calibration. GC/MS instruments, in contrast, are often extraordinarily "finicky" and *require* calibration daily or more frequently. Thus, from a practical perspective, it is unlikely that the chemist's frequent calibrations in *Manewa* are a true indication of the GC/MS test's reliability relative to the analytical balance.

[110] Then-Associate Justice Recktenwald recused himself in *Werle* and *Assaye*, presumably because those cases were appealed to the ICA when he sat on that court.

[111] U.S. CONST. amend. IV. The Fourth Amendment provides:

constitutional provision contains an explicit right to privacy. Article I, section 7 provides that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated."[112]

Under the Lum Court, this constitutional right was interpreted to afford, in some respects, greater protections[113] for defendants in the criminal context.[114] The leading example of enhanced "search and seizure" protections for criminal defendants in the final years of the Lum Court was *State v. Quino*, in which the Lum Court ruled that the Honolulu Police Department's use of the "walk and talk" drug interdiction method at the Honolulu International Airport violated an individual's "right to be secure against unreasonable seizures guaranteed by article I, section 7 of the Hawaii Constitution."[115] The court, of which then-Associate Justice Moon was a part, expressly granted defendants greater protections against search and seizure than those afforded under federal law.[116] After *Quino*, an officer's deliberate and investigative questioning constitutes a seizure that requires an "objective basis for suspecting them of misconduct" (i.e., reasonable suspicion), or the individual's consent.[117] With this ruling, Hawai'i became one of the few states to lower the threshold for when questioning effects a "seizure" on the basis of state law.[118]

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

[112] HAW. CONST. art. 1, § 7.

[113] *See* Van Dyke et al., *supra* note 1; Kawatachi, *supra* note 1.

[114] Because this article focuses on the Moon Court's criminal law jurisprudence, we do not discuss the Hawai'i Constitution's second clause bestowing a more general right to privacy outside of the criminal context. Article I, section 6 provides that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest." HAW. CONST. art. 1, § 6. This provision has been the basis for a number of important decisions by the Moon Court regarding constitutional protection for activities that are "implicit in the concept of ordered liberty." *E.g.*, State v. Mallan, 86 Haw. 440, 950 P.2d 178 (1998) (holding that "the right to possess and use marijuana cannot be considered a 'fundamental' right that is 'implicit in the concept of ordered liberty'" and that "smoking marijuana is [not] a part of the 'traditions and collective conscience of our people'"); *see also* Julia B.L. Worsham, Note, *Privacy Outside of the Penumbra: A Discussion of Hawai'i's Right to Privacy After* State v. Mallan, 21 U. HAW. L. REV. 273 (1999).

[115] 74 Haw. 161, 175, 840 P.2d 358, 365 (1992).

[116] *See id.* at 170, 840 P.2d at 362.

[117] *See id.* at 175, 840 P.2d at 365.

[118] *See* Toby M. Tonaki et al., Comment, State v. Quino, *The Hawai'i Supreme Court Pulls Out All the "Stops"*, 15 U. HAW. L. REV. 289, 336 n.394 (1993); Gail Ezra Cary, *Warrantless Seizures*, 25 RUTGERS L.J. 1188, 1188-89 (1994).

The selected cases below demonstrate the Moon Court's willingness to continue this trend, but not without exception.

B. Case Summaries

1. Kearns *and* Trainor—*"Walk and talk" after* Quino

Less than two years after *Quino* was decided, in 1994, the relatively new Moon Court had occasion to reaffirm the *Quino* ruling and clarify the "consensual encounter" justification for a seizure in *State v. Kearns*.[119] As in *Quino*, the police officers in *Kearns* "seized" the defendant during the course of an investigative "walk and talk" encounter at the airport,[120] and "given the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave."[121] The court rejected the State's argument that the seizure was permissible because Kearns had consented to it.[122] Instead, the court held that "mere acquiescence to questioning" is "insufficient to establish consent" during a walk and talk investigation.[123] In order for a walk and talk encounter to be constitutionally upheld as "consensual," the defendant must have been informed of his or her "right to decline to participate in the encounter and . . . leave at any time" and must have voluntarily participated.[124] Because Kearns had not been so informed and could not have consented, the court ruled that the evidence obtained after the seizure should have been suppressed, and the conviction was vacated.[125] *Kearns* received national attention for its imposition of a more rigorous "consent" standard.[126]

Two years after *Kearns*, the Moon Court addressed the "reasonable suspicion" exception to the warrant requirement.[127] In *State v. Trainor*, the officer initiated a walk and talk encounter with the defendant based on purportedly "objective reasons," including Trainor's baggy clothing, lack of

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[119] 75 Haw. 558, 867 P.2d 903 (1994). Chief Justice Moon was recused from this case.

[120] *See id.* at 564, 867 P.2d at 905.

[121] *See id.* at 566, 867 P.2d at 907.

[122] *See id.* at 569-72, 867 P.2d at 908-9.

[123] *Id.* at 571, 867 P.2d at 909.

[124] *Id.*

[125] *Id.* at 572, 867 P.2d at 910.

[126] *See* Robert J. Burnett, Comment, *Random Police-Citizen Encounters: When is a Seizure a Seizure?*, 33 DUQ. L. REV. 283 (1995); Robert H. Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 OHIO N.U. L. REV. 1, 56-60 (2001).

[127] *See* State v. Trainor, 83 Haw. 250, 925 P.2d 818 (1996). Chief Justice Moon was recused from this case.

check-on baggage, "flushed and shiny" complexion, and harried demeanor.[128] These characteristics, however, were too broad to create a reasonable suspicion of criminal activity.[129] The court noted that "[i]t is precisely because article I, section 7 . . . was designed, among other things, to safeguard [against] . . . arbitrary, oppressive, and harassing conduct by the police that we have conditioned an investigative stop on the police officer's capacity to point to specific and articulable facts . . . that criminal activity is afoot."[130] Without such specific and articulable facts, the officer "was unjustified in initiating an investigative 'encounter' with Trainor."[131]

2. Lopez *and* Cuntapay—*Privacy in the home*

A similar concern for the individual's right to privacy can be seen in the Moon Court's jurisprudence relating to searches of the home. For instance, early in the Moon Court's tenure, the court reaffirmed its commitment to an "actual authority" consent requirement when it ruled in *State v. Lopez*[132] that one must have actual authority to consent to the search of another person's home in order for the search to be constitutional.[133] In *Lopez*, the Moon Court expressly declined to adopt the federal concept of "apparent authority."[134] Thus, when the mother of a defendant granted the investigating officer permission to enter the defendant's home without having first received permission from the defendant to do so, the court ruled the nonconsensual search unconstitutional under article I, section 7.[135] Citing to *Quino*, the court noted that it was "free to provide broader protection under [the] state constitution" than the U.S. Constitution provides and that "[i]n the area of searches and seizures under article I, section 7, [it had] often exercised this freedom."[136]

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[128] *See id.* at 252, 925 P.2d at 820.

[129] *See id.* at 257-58, 925 P.2d at 825-26.

[130] *Id.* at 259, 925 P.2d at 827 (quoting State v. Quino, 74 Haw. 161, 178-80, 840 P.2d 358, 366 (1992) (Levinson, J., concurring) (internal quotations and citations omitted)).

[131] *Id.*

[132] 78 Haw. 433, 896 P.2d 889 (1995).

[133] *See id.* at 445, 896 P.2d at 901.

[134] *See id.* (stating that although "the concept of apparent authority is well-recognized on the federal level, this court has always required a showing of 'actual authority'").

[135] *See id.* at 447, 896 P.2d at 903.

[136] *Id.* at 445, 896 P.2d at 901; *see also* State v. Detroy, 102 Haw. 13, 22, 72 P.3d 485, 494 (2003) (citing *Lopez* with approval). The court did, however, adopt the "inevitable discovery exception" with respect to tangible physical evidence, allowing the prosecution to "present clear and convincing evidence that any evidence obtained in violation of article I, section 7, would inevitably have been discovered by lawful means." *Lopez*, 78 Haw. at 451, 896 P.2d at 907.

Later, in *State v. Cuntapay*,[137] the court similarly departed from federal precedent in its approach to a guest's right to privacy in the host's home.[138] Whereas the U.S. Supreme Court recognized an *overnight* guest's Fourth Amendment right to privacy, the Moon Court declined to so limit the scope of a guest's rights, ruling that a guest "should share his [or her] host's shelter against unreasonable searches and seizures" under article I, section 7 of the Hawai'i Constitution.[139] The court concluded that evidence of drug paraphernalia belonging to the house guest was properly suppressed on the basis that the guest shared a reasonable expectation of privacy in the host's garage and was protected from the warrantless, nonconsensual search of the premises.[140] Justice Nakayama and Chief Justice Moon dissented, not on constitutional principles, but on the basis that the defendant had failed to establish that he held the status of a house guest.[141]

3. Heapy, Spillner, *and* Estabillio—*Privacy on the road*

More recently, the Moon Court revisited these privacy concerns in the context of investigatory traffic stops. Under *State v. Heapy*,[142] an officer cannot establish reasonable suspicion to conduct a traffic stop solely on the basis that the driver turned to avoid a sobriety checkpoint.[143] The officer had effected the traffic stop based on the officer's prior experience that "in every case" in which a driver avoids a checkpoint, the driver was violating the law in some other way.[144] The majority opinion concluded that when a driver engages in no suspicious acts other than making a lawful turn away from the checkpoint, there is no "'reasonable suspicion' that the person stopped was engaged in criminal conduct" to warrant a stop under article I, section 7.[145] Accordingly, the court declined to expand the reasonable suspicion standard to include an officer's generalized knowledge of criminal behavior.[146] Chief Justice Moon dissented, suggesting instead that an otherwise legal turn off the road might create reasonable suspicion considering the totality of the circumstances.[147]

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[137] 104 Haw. 109, 85 P.3d 634 (2004).

[138] *See id.* at 110, 85 P.3d at 635.

[139] *See id.* at 116, 85 P.3d at 641 (quoting Minnesota v. Carter, 525 U.S. 83, 106 (1998) (Ginsburg, J., dissenting)).

[140] *See id.* at 116-18, 85 P.3d at 641-42.

[141] *Id.* at 119, 85 P.3d at 644 (Nakayama, J., dissenting).

[142] 113 Haw. 283, 151 P.3d 764 (2007).

[143] *See id.* at 285, 151 P.3d at 766.

[144] *Id.* at 288, 151 P.3d at 769.

[145] *Id.* at 290, 292, 299, 151 P.3d at 771, 773, 780.

[146] *Id.* at 295-96, 151 P.3d at 776-77.

[147] *See id.* at 308, 151 P.3d at 789 (Moon, C.J., dissenting). Chief Justice Moon also emphasized the State's interest in protecting the safety of the public. *See id.* at 306, 151 P.3d at

The same year *Heapy* was issued, the court did expand the "reasonable suspicion" standard to permit an officer to rely on "knowledge of a suspected ongoing law violation engaged in by the individual in question" when effecting a traffic stop.[148] In *State v. Spillner*, the officer who stopped the defendant's car learned one week earlier that the defendant's truck had no valid insurance and learned two weeks earlier that the defendant had no valid license.[149] The Moon Court ruled that this knowledge of prior violations was enough to provide reasonable suspicion of ongoing criminal activity the *third* time the officer stopped the same defendant, even without any obvious signs of criminal activity before the third stop.[150] This time, Justice Acoba, who authored the majority opinion in *Heapy*, dissented, arguing that the officer did not have "specific and articulable facts" that the defendant was driving a vehicle without a license at the time the stop was made.[151]

In 2009, Chief Justice Moon offered an overview of the court's "case law regarding investigatory detentions" in the course of his opinion in *State v. Estabillio*.[152] In this case, an officer's reasonable suspicion that a defendant was speeding did not constitute reasonable suspicion of drug dealing.[153] The officers stopped the defendant for a traffic offense and eventually discovered drugs in the vehicle.[154] The Moon Court agreed with Estabillio that investigative detention and questioning must be related to the scope of the original detention, which in this case was unrelated to drug paraphernalia.[155] Relying in part on the walk and talk line of cases regarding "inquisitive questioning," the court ruled that the officer's "drug investigation constituted a seizure separate and distinct from the traffic investigation" and was unconstitutional under article I, section 7 because it was unsupported by reasonable suspicion.[156]

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787. *See also* Jacob Matson, Note, *Drunk, Driving, and Untouchable: The Implications of* State v. Heapy *on Reasonable Suspicion in Hawai'i*, 31 U. HAW. L. REV. 607 (2009).

148 *See* State v. Spillner, 116 Haw. 351, 360, 173 P.3d 498, 507 (2007).

149 *See id.* at 363, 173 P.3d at 510.

150 *See id.* at 355, 364, 173 P.3d at 502, 511.

151 *See id.* at 365, 173 P.3d at 512 (Acoba, J., dissenting). *See also* Alana Peacott-Ricardos, Note, State v. Spillner: *An Investigatory Stop Based on Unreasonable Suspicion*, 31 U. HAW. L. REV. 631 (2009) (arguing that *Spillner* was incorrectly decided).

152 121 Haw. 261, 269-70, 218 P.3d 749, 757-58 (2009). Then-Associate Justice Recktenwald was recused from this case.

153 *Id.* at 273, 218 P.3d at 761.

154 *See id.* at 262-63, 218 P.3d at 750-51.

155 *Id.* at 272, 218 P.3d at 760.

156 *Id.* at 274, 218 P.3d at 762.

4. Jane Doe *and* John Doe—*Privacy at school*

There is a distinct line of cases implicating privacy rights in the school setting. Early in his tenure as chief justice, Moon authored an opinion expressly declining to bestow broader protection to school children under article I, section 7 than would otherwise be awarded by the Fourth Amendment.[157] In upholding the family court's denial of a high school defendant's motion to suppress evidence of marijuana uncovered after a search of her purse, the Moon Court ruled in *In re Jane Doe* that "public school officials do not need search warrants or probable cause to search or seize evidence from students under their authority" so long as the search is "reasonably related in scope to the circumstances which justified the interference."[158] Recognizing the school's need to maintain order in a learning environment, the court "perceive[d] no sound or logical reason to afford our public school students greater constitutional protections than that afforded by the federal constitution."[159]

The Moon Court returned to privacy questions in the school context ten years later in *In re John Doe*.[160] Here, school officials had no basis for suspecting the high school student of possessing and selling marijuana other than an anonymous tip from Crime Stoppers.[161] The court ruled that the tip failed to provide either probable cause or reasonable suspicion to justify the search.[162] The tip "bore no indicia of reliability" because the school officials knew nothing about the circumstances under which the tip was provided or the basis of the informant's knowledge.[163] Accordingly, the court affirmed the family court's order suppressing the seized evidence.[164] This case did not, however, alter the earlier *In re Jane Doe* ruling, and the court did not broaden privacy protections under article I, section 7 for the general student population.

C. *Trends and Other Comments on the Privacy Cases*

The principles expounded in the walk and talk cases appear to have shaped the Moon Court's protection of a defendant's right to privacy even beyond the walk and talk encounter. The broader concern for individual privacy rights

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[157] *In re* Jane Doe, 77 Haw. 435, 887 P.2d 645 (1994).

[158] *Id.* at 437, 887 P.2d at 647.

[159] *Id.* at 440, 887 P.2d at 650.

[160] 104 Haw. 403, 91 P.3d 485 (2004), *overruled on other grounds by In re* Jane Doe, 105 Haw. 505, 100 P.3d 75 (2004).

[161] *See id.* at 404-05, 91 P.3d at 486-87.

[162] *See id.* at 408, 91 P.3d at 490.

[163] *Id.* at 411, 91 P.3d at 493.

[164] *Id.* at 404, 91 P.3d at 486.

expressed in *Quino*, *Kearns*, and *Trainor* is mirrored in the *Lopez* ruling on reasonable expectations of privacy in the home and in the *Estabillio* ruling regarding investigatory stops. *Lopez*, which was decided in 1995, and *Estabillio*, which was decided in 2009, essentially bookend the Moon Court's tenure and reflect a consistent adherence to the trend begun in the Lum Court.

This trend is not without exception. Because *Spillner* permitted an officer's own knowledge about the defendant's prior traffic violations to create reasonable suspicion, it is difficult to reconcile *Spillner* with *Heapy*'s ruling that an officer may not use his or her own knowledge of checkpoint avoidance behavior to effect a traffic stop. Neither *Heapy* nor *Spillner* involved any immediate, overt justification for the stop. The explanation for these seemingly disparate rulings may lie in the facts. Unlike in *Heapy*, the officer in *Spillner* had prior contact with the specific defendant and had reason to suspect ongoing violations. The traditionally "objective" nature of reasonable suspicion, as reflected in *Heapy* and Justice Acoba's *Spillner* dissent, suggests that the *Spillner* ruling should be limited to its unusual facts.

In *In re Jane Doe*, the court expressly declined to extend to students the broader privacy protections that it had extended to defendants in other contexts. The court did, however, take special care to limit its ruling to the school context and has not used its school cases to limit privacy rights in other circumstances. These school cases may not be so much a repudiation of the privacy principles from the walk and talk cases as a carefully carved out exception to the broader philosophy of the Moon Court with respect to privacy rights.

Regarding the walk and talk cases specifically, the heightened standard under state law has obvious consequences for state versus federal drug enforcement efforts. Indeed, the Hawai'i State Legislature has acknowledged as much. In 2004, the Legislature released its Final Report on Ice and Drug Abatement.[165] The Joint House-Senate Task Force concluded that the "majority of the Task Force does not recommend a constitutional amendment to permit 'walk and talk' at this time."[166] In response to requests from state law enforcement officers to be able to "prosecute drug offenders under the same standards as federal prosecutors,"[167] the Task Force declined, and noted the ability of federal agents to conduct the walk and talk encounters.[168]

The Legislature's approach effectively shifts the primary responsibility for drug interdiction efforts from state courts to federal courts. And, the chance that a defendant may wind up in federal court instead of state court for these

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[165] JOINT HOUSE-SENATE TASK FORCE, FINAL REPORT OF THE JOINT HOUSE-SENATE TASK FORCE ON ICE AND DRUG ABATEMENT, 22nd. Leg, Reg. Sess. (Haw. 2004), *available at* http://www.capitol.hawaii.gov/session2004/lists/ice_finalrpt.pdf.

[166] *Id.* at 7.

[167] *Id.* at 48.

[168] *See id.* at 7, 52.

offenses serves as a reminder that enhanced rights under article I, section 7 of the Hawai'i Constitution does not equate to a free pass under the Fourth Amendment to the U.S. Constitution.

IV. CONCLUSION

These decisions, selected from Hawai'i's criminal law jurisprudence concerning privacy rights and evidence rules, illustrate a certain freedom and willingness by the Moon Court to forge its own judicial path when applying legislative and constitutional mandates. This appears to be true even if the results were contrary to decisions in other jurisdictions, and where they were perhaps less popular with segments of the legal and law enforcement communities.

In his final State of the Judiciary address, Chief Justice Moon reflected on this freedom, extolling the importance of judicial independence and the court's ability to rule according to its reasoned judgment, without fear of reprisal—what he described as "decisional independence."[169] It remains to be seen exactly how the new Recktenwald Court will exercise its own decisional independence.

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[169] *See* Ronald T.Y. Moon, Chief Justice, Haw. Sup. Ct., *State of the Judiciary Address* (Jan. 27, 2010), http://www.courts.state.hi.us/news_and_reports/featured_news/2010/01/state_of_the_judiciary_2010.html.